

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AGRIUM U.S. INC. and  
ROYSTER-CLARK, INC.,

Defendants.

**1:07 CV 089**

Civil Action No. \_\_\_\_\_

CONSENT DECREE

## TABLE OF CONTENTS

I.	JURISDICTION AND VENUE .....	2
II.	PARTIES BOUND .....	2
III.	DEFINITIONS .....	3
IV.	COMPLIANCE .....	5
	A. NOx Emission Reductions from the Nitric Acid Plant .....	5
	B. Continuous Emissions Monitoring System (CEMS) .....	6
	C. Performance Testing .....	7
	D. Permitting Requirements .....	8
V.	PSD AND MAJOR NONATTAINMENT CREDITS .....	9
VI.	REPORTING .....	10
VII.	CIVIL PENALTY .....	11
VIII.	STIPULATED PENALTIES .....	11
IX.	FORCE MAJEURE .....	13
X.	DISPUTE RESOLUTION .....	16
XI.	PUBLIC ACCESS TO INFORMATION .....	18
XII.	NOTICE .....	18
XIII.	EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS .....	20
XIV.	GENERAL PROVISIONS .....	20
XV.	DOCUMENT RETENTION .....	21
XVI.	RETENTION OF JURISDICTION .....	21
XVII.	TERMINATION .....	22
XVIII.	PUBLIC COMMENT .....	23
XIX.	SIGNATORIES .....	23
XX.	INTEGRATION/APPENDICES .....	24
XXI.	FINAL JUDGMENT .....	24

WHEREAS, Plaintiff, the United States of America ("Plaintiff" or "the United States"), on behalf of the United States Environmental Protection Agency ("U.S. EPA"), has filed a Complaint against the Defendants, Agrium U.S. Inc. and Royster-Clark, Inc. ("Defendants" ) for civil penalties and injunctive relief for violations of the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7470-92, the New Source Performance Standards ("NSPS") of the CAA, 42 U.S.C. § 7411, permitting requirements under Title V of the CAA, 42 U.S.C. §§ 7661-7661f., and the federally approved and enforceable Ohio State Implementation Plan ("Ohio SIP") at a nitrogen production plant in North Bend, Ohio.

WHEREAS, pursuant to Section 113(a)(1) of the CAA, 42 U.S.C § 7413(a)(1), on October 30, 2006 (with mailing on November 1, 2006) U.S. EPA issued Defendants (with a copy to the State of Ohio) Notices and Findings of Violation ("NOV"), thereby providing notice to Defendants and the State of Ohio of EPA's findings of Defendants' alleged violations of the CAA and the Ohio SIP.

WHEREAS, the United States has provided notice of the commencement of this action to the appropriate State air pollution control agency, in accordance with Section 113 (b) of the CAA, 42 U.S.C. § 7413 (b).

WHEREAS, each of the Defendants has denied and continues to deny the violations alleged in the NOV and in the Complaint;

WHEREAS, the United States and the Defendants have agreed that settlement of this action is in the best interest of the parties and in the public interest, have agreed on the appropriateness of various measures intended to resolve the alleged violations and have further agreed that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter; and

WHEREAS, the United States and the Defendants have consented to entry of this Consent Decree without trial of any issues;

NOW, THEREFORE, without any admission of fact or law, and without any admission of the violations alleged in the Complaint or NOV's, it is hereby ORDERED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1355; Section 113(b) and 167 of the CAA, 42 U.S.C. § 7413(b) and 7477; and over the parties to this action. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and 1395(a), and 42 U.S.C. § 7413(b). The Complaint states claims upon which relief may be granted against the Defendants.

2. Solely for the purposes of this Consent Decree and the underlying Complaint, the Defendants waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this District. The Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II. PARTIES BOUND

3. This Consent Decree shall apply to and be binding upon the United States and upon the Defendants and their successors and assigns. In any action to enforce the terms of this Consent Decree, the Defendants shall not raise as a defense the failure of their officers, directors, agents, servants, contractors, or employees to take any actions necessary to comply with the provisions hereof.

4. No change in ownership of the Facility or any portion thereof shall in any way alter the Defendants' responsibilities under this Consent Decree; nor shall any change in corporate status or ownership affect the Defendants' obligations under this Consent Decree. At least thirty (30) days prior to transferring ownership or operation of any part of the Facility, the Defendants shall give notice of the terms of this Consent Decree to the prospective successor owner or operator of the Facility or portion thereof, and shall simultaneously verify to the United States in writing, in the manner set forth in Section XII (Notice), that such notice has been given.

No such sale or transfer shall relieve the Defendants of any obligation set forth herein unless agreed to in writing by the United States and approved by the Court.

### III. DEFINITIONS

5. Unless otherwise expressly stated, the terms used in this Consent Decree that are defined in the CAA, or in regulations promulgated thereunder, shall have the meanings set forth in such definitions.

6. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

- a. "CAA" means the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq.
- b. "Calendar quarter" means the three month period ending on March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup>, or December 31<sup>st</sup>.
- c. "Consent Decree" or "Decree" means this Consent Decree and all attachments hereto, and all modifications of this Consent Decree.
- d. "Continuous Emission Monitoring System (CEMS)" means the electronic equipment that continuously measures and records the concentration and/or emission rate of a pollutant in the units specified by the applicable standard.
- e. "Day" means a calendar day unless expressly stated to be a Working Day. "Working Day" means a day other than a Saturday, Sunday or federal or State holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or federal or State holiday, the period will run until the close of business of the next Working Day.
- f. "Defendants" means Agrium U.S. Inc. and Royster-Clark, Inc.
- g. "Effective Date" means the date of entry of this Consent Decree by the Court pursuant to paragraph 62 of this Decree;
- h. "Facility" means the facility currently owned or operated by Defendant Agrium U.S. Inc. at 10743 Brower Road, North Bend, Ohio 45052.

i. "Interest" means interest at the rate specified for a money judgment in a civil case recovered in a district court pursuant to 28 U.S.C. § 1961.

j. "Malfunction" means, consistent with 40 C.F.R. § 60.2, any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner; failures that are caused in part by poor maintenance or careless operation are not considered malfunctions.

k. "Nitric Acid Plant" means the production unit at the Facility engaged in the production of nitric acid.

l. "NO<sub>x</sub>" mean the pollutant nitrogen oxides.

m. "OEPA" means the Ohio Environmental Protection Agency.

n. "Operating Hours" means any hours when the Facility is producing nitric acid, including start-up, shutdown and malfunction.

o. "Paragraph" means a portion of this Consent Decree identified by an arabic number.

p. "Parties" means the United States of America and the Defendants.

q. "Permit to Install" means a permit to install issued by Ohio EPA pursuant to Ohio Admin. Code Chapter 3745-31.

r. "Plaintiff" means the United States of America.

s. "SCR" means a device that employs selective catalytic reduction technology for the reduction of nitrogen oxides.

t. "Section" means a portion of this Consent Decree identified by a Roman numeral.

u. "Shutdown" means the cessation of operation of the Nitric Acid Plant for any reason.

v. "Startup" means the setting in operation of the Nitric Acid Plant for any purpose.

- w. "State" means the State of Ohio.
- x. "Strong Acid" means nitric acid which is 67% or greater in strength.
- y. "United States" means the United States of America, including the U.S.

EPA.

z. "U.S. EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

aa. "Weak Acid" means nitric acid which is less than 67% in strength.

bb. "Work" means all activities the Defendants are required to perform under this Consent Decree.

#### IV. COMPLIANCE

##### A. NOx Emission Reductions from the Nitric Acid Plant

7. Not later than 24 months after entry of this Consent Decree, the Defendants shall complete installation and commence operation of (and thereafter maintain operation of) a Selective Catalytic Reduction device ("SCR") at the Nitric Acid Plant. By not later than 24 months after entry of this Consent Decree, the Defendants shall comply with the following NOx emission limits:

- a. 0.61 pounds of NOx (expressed as NO<sub>2</sub>) per ton of 100 percent nitric acid produced (lbs/ton) averaged over all Operating Hours in a rolling 365 day period. This requirement shall apply at all times the nitric acid plant is in operation. Compliance with this requirement shall be first demonstrated 365 days after the date the emission limit becomes applicable.
- b. 1.0 pounds of NOx (expressed as NO<sub>2</sub>) per ton of 100 percent nitric acid produced (lbs/ton) averaged over 3 rolling hours of operating time. This short-term limit shall not apply during periods of startup, shutdown, or malfunction of the Nitric Acid Plant or during a malfunction of the SCR, provided that during such periods the Defendants implement good air pollution control practices.
- c. The Parties do not anticipate that the Defendants will be required to obtain a Permit to Install for installation of the SCR on the Nitric Acid Plant under the Ohio State Implementation Plan. However, in the event that a Permit to Install is required for installing this SCR, the deadline for meeting the emission limitations in this Paragraph will be extended by 90 days. Any further extension to the deadline for meeting the emission limitations under this paragraph which is

attributable to the need to obtain a Permit to Install must qualify under the provisions of Section IX (Force Majeure).

8. Not later than 24 months after entry of this Consent Decree, the Nitric Acid Plant shall be considered an affected facility for purposes of 40 C.F.R. Part 60, Subpart G, and shall comply with applicable requirements for affected facilities under 40 C.F.R. Part 60, Subparts A and G, except as otherwise provided herein.

B. Continuous Emissions Monitoring System (CEMS)

9. In advance of the performance test required under paragraph 13 of this Consent Decree, the Defendants shall install and make operational a NO<sub>x</sub> CEMS on the Nitric Acid Plant. Except during CEMS breakdowns, repairs, calibration checks, and zero span adjustments, the CEMS shall operate at all times during operation of the Nitric Acid Plant. The NO<sub>x</sub> CEMS shall meet the following requirements:

- a. The CEMS shall consist of equipment necessary to monitor the NO<sub>x</sub> concentration in the main stack, or the NO<sub>x</sub> concentration of the gas stream to the main stack if an aspirating stack is used, and the NO<sub>x</sub> concentration in any bypass stack.
- b. The CEMS shall be installed, certified, calibrated, maintained, and operated in accordance with the applicable requirements of 40 C.F.R. §§ 60.11, 60.13, Part 60, Appendix B, Performance Specification 2, and Part 60, Appendix F, Procedure 1.
- c. In lieu of the span value requirements of 40 C.F.R. § 60.73(a), the CEMS shall have a dual span value in order to measure NO<sub>x</sub> concentrations during normal operations and during a startup, shutdown or malfunction (SSM) event. The span value for use during normal operations shall be set at 125% of the maximum estimated concentration of NO<sub>x</sub> during normal operation. The span value for use during SSM events shall be set at 125% of the maximum estimated concentration of NO<sub>x</sub> during an SSM event. Within 90 days of the date of entry of this Consent Decree, the Defendants shall submit to U.S. EPA an alternative monitoring plan in accordance with 40 C.F.R. § 60.13(i) to account for these changes to the span value requirements.
- d. The NO<sub>x</sub> CEMS shall monitor and record the NO<sub>x</sub> concentration (in parts per million) and 3-hour average NO<sub>x</sub> emission rate in units of lbs/ton from the nitric acid plant. The CEMS shall also monitor and record the rolling 365 day average NO<sub>x</sub> emission rate from the nitric acid plant in units of lbs/ton.
- e. The CEMS shall be used to demonstrate compliance with the emission limits established in paragraph 7 of this Consent Decree.



10. In the performance test required under paragraph 13 of this Consent Decree, the Defendants shall establish conversion factors for the purpose of converting monitoring data, in terms of NO<sub>x</sub> concentration, into terms of mass of NO<sub>x</sub> per unit of acid production. A separate conversion factor shall be established for production of Strong Acids and Weak Acids. These conversion factors shall be reestablished during each performance test or CEMS performance evaluation. The conversion factors shall be used by the CEMS to calculate the NO<sub>x</sub> emission rate expressed as lbs/ton and demonstrate compliance with the emission limits in paragraphs 7.a. and 7.b.

11. Consistent with 40 C.F.R. Part 60, Appendix F, the Defendants shall take all steps necessary to avoid CEMS breakdowns and minimize downtime. This shall include, but is not limited to, operating and maintaining the CEMS in accordance with best practices and maintaining an on-site inventory of spare parts or other supplies necessary to make rapid repairs of the equipment.

12. In the event of CEMS downtime lasting longer than 24 hours, the Defendants shall demonstrate compliance with paragraph 7 of this Consent Decree by implementing an alternative monitoring procedure, which the Defendants shall propose for inclusion in the Facility's Title V operating permit pursuant to paragraph 17 of this Consent Decree. This procedure shall involve making physical measurements of the NO<sub>x</sub> concentration in the gas stream to the main stack. These measurements shall be collected and analyzed once every three hours until the CEMS resumes operation, and these measurements must be recorded and included in the 365 day rolling average NO<sub>x</sub> emission calculations.

C. Performance Testing

13. By no later than the date upon which the NO<sub>x</sub> emission limits established by paragraph 7 of this Consent Decree must be met or the date U.S. EPA approves the alternative monitoring plan required at paragraph 9.c. of this Consent Decree, which ever comes later, the Defendants shall conduct a performance test on the Nitric Acid Plant in accordance with the

applicable requirements of 40 C.F.R. §§ 60.8, 60.74, Part 60, Appendix A, and Part 60, Appendix B. This test must consist of at least 9 reference method test runs conducted during periods of representative performance of the Nitric Acid Plant and may serve as the NSPS performance test required under 40 C.F.R. § 60.8 and the CEMS relative accuracy test required under Performance Specification 2 in Part 60, Appendix B. In order to develop the conversion factors required under paragraph 10 of this Consent Decree, at least 3 reference method test runs must be conducted during the production of each Strong Acid and Weak Acid. The Defendants shall take all steps necessary to assure accurate measurements of 100% nitric acid production during each test run.

14. The Defendants shall notify U.S. EPA at least 30 days before the performance test required under paragraph 13 of this Consent Decree of its intent to test. This notification must include the date of the test, an emissions test protocol, a description of the planned operating rate and operating conditions, and the procedures that will be used to measure 100% nitric acid production. The Defendants must make any adjustment to the testing protocol or operating conditions required by U.S. EPA.

15. Not later than 30 days after the performance test required by paragraph 13 is conducted, the Defendants shall submit a report documenting the results of the performance test to U.S. EPA Region 5, OEPA, and the Hamilton County Department of Environmental Services.

D. Permitting Requirements

16. By no later than 25 months after the effective date of the Consent Decree, the Defendants shall submit an application to the Hamilton County Department of Environmental Services for a permit to install under OAC 3745-31-02(A)(2) that shall:

- a. Incorporate the emission limits on the Nitric Acid Plant established in paragraph 7 of this Consent Decree;
- b. Incorporate all applicable requirements of 40 C.F.R. Part 60, Subpart G to the Nitric Acid Plant;

- c. Incorporate the monitoring requirements established in paragraphs 9 through 12 of this Consent Decree including the requirement to meet the quality assurance procedures required by 40 C.F.R. Part 60 Appendix F;
- d. Incorporate a provision which states that the requirements established under this Consent Decree may not be relaxed.

17. Not later than 6 months after issuance of the permit referred to in paragraph 16 of this Consent Decree, the Defendants shall submit all necessary applications to revise the Facility's Title V operating permit to:

- a. Incorporate the emission limits on the Nitric Acid Plant established in paragraph 7 of this Consent Decree;
- b. Incorporate all applicable requirements of 40 C.F.R. Part 60, Subpart G to the Nitric Acid Plant;
- c. Incorporate the monitoring requirements established in paragraphs 9 through 12 of this Consent Decree including the requirement to meet the quality assurance procedures required by 40 C.F.R. Part 60 Appendix F;
- d. Include the ammonia flaring device as a significant emission unit.

V. PSD AND MAJOR NONATTAINMENT CREDITS

18. The Defendants will neither generate nor use any NOx emission reductions resulting from any projects conducted pursuant to this Consent Decree for the purpose of obtaining netting credits or offsets in any PSD, major nonattainment (meaning the nonattainment area new source review program within the meaning of Part D of Subchapter I of the CAA, 42 U.S.C. §§ 7510-7515, 40 C.F.R. Part 51, and OAC 3745-31-21 through 26) and/or minor NSR permit or permit proceeding. However, nothing in this paragraph of the Consent Decree shall be construed to limit the generation and use of emissions offsets or credits respecting NOx emission reductions that are either more stringent than the emissions limits established under the Consent Decree or achieved from sources not covered under the Consent Decree, or respecting reductions of any other pollutant at any source.

## VI. REPORTING

19. The Defendants shall submit semi-annual progress reports as specified herein covering the periods following the Effective Date of this Consent Decree and continuing through termination of this Consent Decree pursuant to Section XVII. Reports covering all such periods from January 1 through June 30 of any calendar year shall be submitted by July 31 of that year; reports covering all such periods from July 1 through December 31 of any calendar year shall be submitted by January 31 of the next calendar year. All such reports shall contain the following information: 1) any updates or modifications to the design specification of the SCR system and monitoring equipment required by Section IV above; 2) a progress report on the status of implementation of the requirements of Section IV above; 3) a summary of the emissions monitoring and testing data collected as required by Section IV above during the reporting period; 4) a summary of all permitting activity related to this Consent Decree for the reporting period; 5) a description of any problems anticipated with respect to meeting the requirements of Section IV above; and 6) any such additional matters as the Defendants believe should be brought to the attention of the United States or U.S. EPA. In addition, the design specifications of the SCR system and monitoring equipment required by Section IV, above, shall be submitted by the later of the first of the foregoing reports or within 90 days of entry of the Consent Decree.

20. The Defendants shall submit the performance testing reports required under paragraphs 14 and 15 of this Consent Decree in accordance with those provisions.

21. All reports shall be certified by the person responsible for environmental management and compliance for the Defendants as follows:

I certify under penalty of law that this information was prepared under my direction or supervision in accordance with a system designated to assure that qualified personnel properly gather and evaluate the information submitted. Based on my directions and my inquiry of the person(s) who manage the system, or the person(s) directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete.

## VII. CIVIL PENALTY

22. Not later than thirty (30) days after entry of this Consent Decree, the Defendants shall pay to the United States a civil penalty in the amount of \$750,000.00 plus Interest accrued from the date that this Consent Decree is lodged with the Court. The payment shall be made by Fed Wire Electronic Funds Transfer ("EFT") to the Department of Justice Lockbox Bank, in accordance with specific instructions to be provided to the Defendants following entry of this Consent Decree, and shall reference DOJ Case No. 90-5-2-1-08469, the Civil Action Number assigned to this case by the United States District Court, Southern District of Ohio, and U.S.A.O. File No. 2005V00857. The Defendants shall advise the Financial Litigation Unit of the United States Attorney's Office for the Southern District of Ohio at the time payment is being wire-transferred to the lock-box bank. In addition, the Defendants shall confirm to U.S. EPA and the Department of Justice that payment has been made by providing notice in the manner specified in Section XII (Notice), below.

23. Civil penalties paid pursuant to this Consent Decree shall not be deductible for purposes of Federal taxes.

## VIII. STIPULATED PENALTIES

24. The Defendants shall be liable for stipulated civil penalties to the United States for failure to comply with the requirements of this Consent Decree unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of the Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree. The Defendants shall pay the following stipulated penalties per violation per day for noncompliance with any of the requirements identified below:

<b>Consent Decree Violation</b>	<b>Stipulated Penalty (Per day per violation, unless otherwise specified)</b>
a. Each failure to meet any emission limit established under paragraph 7 of this Consent Decree, where the violation is less than 5% in excess of the limit set forth in this Consent Decree	\$500 during the first 30 days, \$1,000 thereafter
b. Each failure to meet any emission limit established under paragraph 7 of this Consent Decree, where the violation is equal to or greater than 5% but less than 10% in excess of the limits set forth in this Consent Decree	\$1,000 during the first 30 days, \$1,500 thereafter
c. Each failure to meet any emission limit established under paragraph 7 of this Consent Decree, where the violation is equal to or greater than 10% in excess of the limits set forth in this Consent Decree	\$1,500 during the first 30 days, \$2,000 thereafter
d. Failure to install, commence operation, or continue operation of the SCR	\$ 5,000 during the first 30 days \$10,000 during the next 30 days,\$32,500 thereafter
e. Failure to install or operate CEMS as required by the Consent Decree	\$1,000 during the first 30 days, \$2,000 thereafter
f. Failure to conduct testing as required by the Consent Decree	\$1,000 during the first 30 days, \$2,000 thereafter
g. Failure to apply for the permits required by the Consent Decree	\$1,000 during the first 30 days, \$2,000 thereafter
h. Failure to timely submit, modify, or implement, as approved, the reports, plans, studies, analyses, protocols, or other submittals required by this Consent Decree	\$750 during the first 30 days, \$1,000 thereafter
i. Any other violation of this Consent Decree	\$1,000

25. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the day complete performance occurs or the day complete correction of noncompliance occurs.

26. Nothing herein shall preclude the simultaneous accrual of penalties for separate violations of this Consent Decree.

27. The stipulated penalties herein shall be in addition to, and shall in no way limit, other remedies or sanctions available to the United States by reason of the Defendants' failure to

comply with the requirements of this Decree, the CAA, or the Ohio State Implementation Plan. For any violation of applicable law or regulation for which this Consent Decree also provides for payment of a stipulated penalty, Defendants shall be allowed a credit for stipulated penalties paid against any statutory penalties imposed for such violation.

28. Stipulated penalties required by paragraph 24, above, are not due and payable until demanded in writing by the United States. Notwithstanding this provision, failure by the United States to demand stipulated penalties shall have no effect on the accrual of such penalties.

29. The Defendants shall pay the amount of any stipulated penalties required by paragraph 24, above, within 15 Working Days of the Defendants' receipt from the United States of a demand for such stipulated penalties. Interest shall accrue on any stipulated penalty, or any portion thereof, that is overdue, at the rate set by 28 U.S.C. § 1961, and shall continue to accrue until the penalty is paid. All stipulated penalty payments shall be paid by certified or cashier's check(s) made payable to the "Treasurer of the United States," and mailed to the United States Attorney's Office for the Southern District of Ohio. A transmittal letter shall accompany each payment that indicates that the payment is for stipulated penalties, states the basis for the payment of stipulated penalties, and references the case name and civil action number, U.S.A.O. File No. 2005V00857, DOJ Case No. 90-5-2-1-08469, and the name and address of the party making payment. Copies of the transmittal letter and check(s) shall be sent on the same day to the United States in the manner specified in Section XII (Notice).

#### IX. FORCE MAJEURE

30. If any event causes or may cause a delay in the Defendants' compliance with any provision of this Consent Decree, the Defendants shall notify the United States in writing as soon as practicable, but in any event within fifteen (15) days of when the Defendants first knew of the event, or should have known of the event by the exercise of due diligence. A "Force Majeure Event" is any event beyond the control of the Defendants, their contractors, or any entity controlled by the Defendants that delays the performance of any obligation under this Consent

Decree despite the Defendants' best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential Force Majeure Event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include the Defendants' financial inability to perform any obligation under this Consent Decree. In this notice, the Defendants shall specifically reference this provision of the Consent Decree and describe the anticipated length of the delay, the cause or causes of the delay, all measures taken or to be taken by the Defendants to prevent or minimize the delay, the schedule by which those measures will be implemented and the Defendants' rationale for attributing any delay to a Force Majeure Event. The Defendants shall adopt all reasonable measures to avoid and minimize such delays.

31. Failure by the Defendants to comply with the above notice requirements shall constitute a waiver of the Defendants' right to assert Force Majeure. Notification of any delay, in and of itself, shall not extend the time allowed for meeting any requirement or excuse the delay or payment of stipulated penalties.

32. If U.S. EPA agrees that the violation has been or will be caused solely by circumstances beyond the control of the Defendants or any entity controlled by the Defendants, including their contractors, and that the Defendants could not have foreseen and prevented such delay by the exercise of due diligence, U.S. EPA shall extend the time for compliance with the particular requirement(s) affected by the Force Majeure by a period not exceeding the delay actually caused by such circumstances. The Defendants shall not be liable for stipulated penalties for the period of any such delay. Such an extension does not alter the schedule for any other part of this Consent Decree, except that U.S. EPA shall extend the time for performance of other tasks under this Consent Decree that U.S. EPA determines will necessarily be delayed as a result of the Force Majeure.

33. The Parties agree that, depending upon the circumstances related to an event and



the Defendants' response to such circumstances, the kinds of events listed below are among those that could qualify as Force Majeure Events within the meaning of this Section: construction, labor, or equipment delays; acts of God; and acts of war or terrorism. Depending upon the circumstances and the Defendants' response to such circumstances, failure of a permitting authority to issue a necessary permit in a timely fashion may constitute a Force Majeure Event where the failure of the permitting authority to act is beyond the control of the Defendants and the Defendants have taken all steps available to them to obtain the necessary permit, including, but not limited to, submitting a complete permit application, responding to requests for additional information by the permitting authority in a timely fashion, accepting lawful permit terms and conditions, and prosecuting in an expeditious fashion appeals of any allegedly unlawful terms and conditions imposed by the permitting authority.

34. If U.S. EPA does not agree with the Defendants' claim of Force Majeure, U.S. EPA's position shall be binding, unless the Defendants invoke the Dispute Resolution procedures of this Consent Decree. In any such Dispute Resolution proceeding, if the Court determines that the violation has been or will be caused solely by circumstances beyond the control of the Defendants or any entity controlled by the Defendants, including their contractors, and that the Defendants could not have foreseen and prevented such delay by the exercise of due diligence, the Defendants shall be excused as to that violation and delay (including stipulated penalties), but only for the delay actually caused by such circumstances.

35. The Defendants shall bear the burden of proving that any delay of any requirement of this Consent Decree was caused or will be caused solely by circumstances beyond the control of the Defendants or any entity they control, including their contractors, and that the Defendants could not have foreseen and prevented such delay by the exercise of due diligence. The Defendants shall also bear the burden of proving the duration and extent of any delay attributable to such circumstances. Absent written approval by the United States, an extension of one

compliance date based on a particular event shall not of itself result in an extension of a subsequent compliance date or dates.

36. Unanticipated or increased costs or expenses associated with the performance of the Defendants' obligations under this Consent Decree shall not constitute circumstances beyond the Defendants' control, or serve as a basis for an extension of time under this Section. Temporary shutdowns for routine maintenance do not constitute circumstances beyond the Defendants' control for purposes of this Section.

#### X. DISPUTE RESOLUTION

37. Unless otherwise expressly provided for in this Consent Decree, the provisions of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the provisions in this Section shall not apply to actions by the United States to enforce obligations of the Defendants that have not been disputed in accordance with this Section.

38. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends a written Notice of Dispute to the other party.

39. If the Parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the position advanced by U.S. EPA shall be considered binding unless, within ten (10) Working Days after the conclusion of the informal negotiation period, the Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position, any supporting documentation relied upon by the Defendants, and any actions which the Defendants consider necessary to resolve the dispute.

40. An administrative record of the dispute shall be maintained by U.S. EPA. The administrative record shall include the Statement of Position and all of the information provided by the Defendants pursuant to the preceding paragraph, as well as any other documents relied upon by U.S. EPA in making its final decision pursuant to the next paragraph. Where appropriate, U.S. EPA shall allow submission of supplemental statements of position, data, reports, or affidavits, by the parties to the dispute.

41. If U.S. EPA concurs with the Defendants' position, U.S. EPA shall provide written notice of such concurrence to the Defendants. If U.S. EPA does not concur with the Defendants' position, U.S. EPA shall so notify the Defendants in writing, setting forth the basis of its decision. U.S. EPA's decision shall control unless, within fifteen (15) Working Days after receipt of U.S. EPA's written determination, the Defendants file a Notice of Judicial Appeal that shall set forth a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to the Notice of Judicial Appeal.

42. In any such judicial appeal, the Defendants shall have the burden of demonstrating that the United States' position is arbitrary and capricious or otherwise not in accordance with law. The Court shall base its decision on the administrative record. The Court may grant relief, or may, upon motion of either party or on its own motion, remand the dispute for further consideration by U.S. EPA, including supplementation of the administrative record as appropriate.

43. The invocation of formal dispute resolution procedures under this Section shall not extend or postpone any of the Defendants' obligations under this Consent Decree, but the payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall

continue to accrue during proceedings to resolve disputes under this Consent Decree until the following:

a. If the dispute is resolved by agreement or by a decision of U.S. EPA that is not appealed to the Court, accrued penalties determined to be owing shall be paid to U.S. EPA within fifteen (15) Working Days of the agreement or the Defendants' receipt of U.S. EPA's decision;

b. If the dispute is appealed to the Court and U.S. EPA prevails in whole or in part, within sixty (60) days of its receipt of the Court's decision, the Defendants shall pay all accrued penalties determined by the Court to be owed to U.S. EPA, except as provided in Subparagraph c., below; or

c. If the District Court's decision is appealed by any party, within sixty (60) days of receipt of the District Court's decision, the Defendants shall pay all accrued penalties determined by the Court to be owing to the United States into an interest-bearing escrow account. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall remit the balance to the prevailing party.

#### XI. PUBLIC ACCESS TO INFORMATION

44. All information and documents the Defendants submit to U.S. EPA pursuant to this Consent Decree shall be subject to public inspection, unless the Defendants identify and support a claim for confidential business information in accordance with 40 C.F.R. Part 2.

45. If no claim of confidentiality accompanies documents or information when they are submitted to U.S. EPA, the public may be given access to such documents or information without further notice in accordance with 40 C.F.R. Part 2.

#### XII. NOTICE

46. Unless otherwise provided herein, notifications to or communications with U.S. EPA or the Department of Justice shall be deemed submitted on the date they are postmarked and

sent either by overnight receipt mail service or by certified or registered mail, return receipt requested.

47. Unless this Consent Decree states otherwise, all notices, submissions, or communications in connection with this Consent Decree shall be made in writing and addressed as follows:

As to the U.S. EPA:

Chief, Air Enforcement and Compliance  
Assurance Branch  
Air and Radiation Division, AE-17J  
U.S. EPA, Region V  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

and

Robert L. Thompson  
Associate Regional Counsel  
Office of Regional Counsel (C-14J)  
U.S. EPA, Region V  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

As to the United States (in addition to the U.S. EPA addressees above):

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
(Reference: DOJ Case No. 90-5-2-1-08469)

As to the Defendants.:

Jeff Grussing  
EH & S Manager, North American Wholesale  
Agrium, Inc.  
13131 Lake Fraser Drive, S.E.  
Calgary, Alberta  
T2J7E8, Canada

P. Scott Burton  
Bingham McCutchen LLP  
355 S. Grand Ave., Suite 4400  
Los Angeles, CA 90071-1560

48. All submissions, reports, or notices required by this Consent Decree to be submitted by the Defendants shall be certified by a responsible corporate official, and accompanied by the following certification:

I certify that the information contained in or accompanying this submission is true, accurate and complete to the best of my knowledge and belief. This certification is based on my personal preparation, review, or analysis of the submission, and/or supervision of persons who, acting on my direct instructions, made the verification that the submitted information is true, accurate and complete.

### XIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

49. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging of the Consent Decree. The United States reserves all legal and equitable remedies to enforce the provisions of this Consent Decree, except as expressly stated herein. This Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the CAA or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified herein.

### XIV. GENERAL PROVISIONS

50. This Consent Decree is not a permit. Compliance with its terms does not guarantee compliance with all Federal, State or local laws or regulations.

51. In any subsequent administrative or judicial proceeding initiated by the United States, the Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case. Provided, however, that nothing in this paragraph limits the resolution of civil claims as set forth in paragraph 49.

52. Nothing in this Consent Decree is intended, nor shall it be construed, to operate in any way to resolve any criminal liability of the Defendants.

53. This Consent Decree shall not relieve the Defendants of their obligation to comply with all applicable provisions of Federal, State or local law, and with any order of the Court, including, but not limited to, an order pursuant to Section 303 of the CAA, 42 U.S.C. § 7603; nor shall it be construed to be a ruling on, or determination of, any issue related to any Federal, State or local permit.

54. This Consent Decree does not limit or affect the rights of the Defendants or the United States as against any third parties.

55. Each Party to this action shall bear its own costs and attorney's fees.

56. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

#### XV. DOCUMENT RETENTION

57. The Defendants agree that they shall preserve, during the pendency of this Consent Decree and for a minimum of five (5) years after its termination, at least one legible copy of all records and documents, including computer tapes, in its possession, custody, or control of its divisions, employees, agents, accountants, contractors, and attorneys, that relate to the violations alleged in the Complaint filed by Plaintiff, and the performance of the Defendants' obligations under this Consent Decree, including, but not limited to, documents embodying or relating to the results of any sampling, tests, or other data or information generated or acquired by the Defendants, or on the Defendants' behalf.

#### XVI. RETENTION OF JURISDICTION

58. This Court shall retain jurisdiction to modify or enforce the terms of this Consent Decree or to take any action necessary or appropriate for its construction of execution.

## XVII. TERMINATION

59. Termination as to Completed Tasks. As soon as the Defendants complete a construction project or other requirement of this Consent Decree that is not ongoing or recurring, the Defendants may seek termination of the provision or provisions of this Consent Decree that imposed the requirement.

60. Termination of Consent Decree. This Consent Decree shall be subject to termination upon motion by either party after the Defendants satisfy all requirements of this Consent Decree. The requirements for termination include:

- a. The Defendants have successfully installed and commenced operation of all pollution controls required by this Decree;
- b. The Defendants have requested and obtained a federally enforceable Clean Air Act permit in accordance with and containing the provisions required by paragraph 16;
- c. The Defendants have demonstrated compliance with the emission limits in paragraph 7 of this Consent Decree for at least 730 consecutive days;
- d. The Defendants have requested and obtained a final Title V permit as required by paragraph 17 that includes as enforceable permit terms all of the performance and other requirements under Section IV (Compliance);
- e. The Defendants have paid all penalties due under Section IX (Civil Penalty) and accruing under Section X (Stipulated Penalties);
- f. The Defendants have otherwise complied with every other obligation of this Consent Decree; and
- g. The Defendants have certified that the information in a, b, c, d, e, and f above have been met.

61. In the event that the Defendants seek to terminate a provision of this Consent Decree under paragraph 59 or to terminate this Consent Decree under paragraph 60, they shall submit a Request For Termination to the United States, stating, as applicable, that they have satisfied all requirements of the provision it seeks to terminate under paragraph 59 or have satisfied all the requirements for Consent Decree termination in paragraph 60, together with all necessary supporting documentation. Following receipt by the United States of the Defendants'



Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether, as applicable, the Defendants have satisfactorily complied with all the requirements of the provision they seek to terminate under paragraph 59 or has satisfied all the requirements for Consent Decree termination in paragraph 60. If the United States agrees that the requirements of the provision have been satisfied or that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the provision of the Consent Decree or the Consent Decree, as applicable. If the United States does not agree that the provision of the Consent Decree or the Consent Decree may be terminated, the Defendants may invoke Dispute Resolution under Section X of this Decree. However, the Defendants shall not seek Dispute Resolution of any dispute relating to termination, until after service of its Request for Termination.

#### XVIII. PUBLIC COMMENT

62. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days, for public notice and comment in accordance with the provisions of 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments received disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper or inadequate. If no comments are received or no changes are proposed in response to public comments, the Defendants consent to entry of the Consent Decree without further notice. This Consent Decree shall become effective upon entry by the Court.

#### XIX. SIGNATORIES

63. Each undersigned representative of the Defendants and the Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such party to this Decree.

64. The Defendants shall identify, on the attached signature pages, the name, address and telephone number of an agent who is authorized to accept service or process by mail on

behalf of the Defendants with respect to all matters arising under or relating to this Consent Decree. The Defendants hereby agree to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons, and to accept service of the Complaint filed in this action by regular U.S. mail. The Parties agree that the Defendants need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

65. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

#### XX. INTEGRATION/APPENDICES

66. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

#### XXI. FINAL JUDGMENT


67. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court between the United States and the Defendants.

SO ORDERED THIS      DAY OF      , 2007.

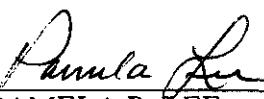
\_\_\_\_\_  
United States District Judge

Through their undersigned representatives, the Parties agree and consent to entry of the foregoing Consent Decree in United States of America v. Agrium U.S. Inc. and Royster-Clark, Inc.:

FOR PLAINTIFF UNITED STATES OF AMERICA:

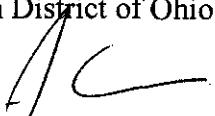
  
W. BENJAMIN FISHEROW  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice

Date: 12/26/06

  
PAMELA R. LEE  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Phone: (202) 305-2775


Date: 12/21/06

GREGORY G. LOCKHART  
United States Attorney for the  
Southern District of Ohio

  
JAMES C. COOMBE (0025538)  
Assistant United States Attorney  
221 East 4<sup>th</sup> Street  
Suite 400  
Cincinnati, Ohio 45202  
Phone: (513) 684-3711


Date: 2/5/07

Through their undersigned representatives, the Parties agree and consent to entry of the foregoing Consent Decree in United States of America v. Agrium U.S. Inc. and Royster-Clark, Inc.:


  
GRANT Y. NAKAYAMA  
Assistant Administrator for Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

Date: January 29, 2007

Through their undersigned representatives, the Parties agree and consent to entry of the foregoing Consent Decree in United States of America v. Agrium U.S. Inc. and Royster-Clark, Inc.:

  
\_\_\_\_\_  
MARY A. GADE  
Regional Administrator  
Region 5  
U.S. Environmental Protection Agency

Date: 4/30/07

  
\_\_\_\_\_  
ROBERT L. THOMPSON  
Associate Regional Counsel  
Office of Regional Counsel (C-14J)  
U.S. EPA, Region 5  
77 W. Jackson Boulevard  
Chicago, Illinois 60604-3590

Date: 1/31/07

Through their undersigned representatives, the Parties agree and consent to entry of the foregoing Consent Decree in United States of America v. Agrium U.S. Inc. and Royster-Clark, Inc.:

FOR DEFENDANT, Agrium U.S. Inc.:

  
GLENN STROUD  
General Manager U.S. Nitrogen  
1551 Farm Rd.  
P.O. Box 5067  
Borger, TX 79008-5067

Date: 12/14/06

The following is the name and address of Defendant Agrium U.S. Inc.'s agent for service pursuant to Paragraph 64.


P. Scott Burton  
Bingham McCutchen LLP  
355 S. Grand Ave., Suite 4400  
Los Angeles, CA 90071-1560

Through their undersigned representatives, the Parties agree and consent to entry of the foregoing Consent Decree in United States of America v. Agrium U.S. Inc. and Royster-Clark, Inc.:

FOR DEFENDANT, Royster-Clark, Inc.:



RICHARD GEARHEARD  
President  
Royster-Clark, Inc.  
4582 South Ulster Street, Suite 1700  
Denver, CO 80237

Date: 12/14/06 

The following is the name and address of Defendant Royster-Clark, Inc.'s agent for service pursuant to Paragraph 64.

P. Scott Burton  
Bingham McCutchen LLP  
355 S. Grand Ave., Suite 4400  
Los Angeles, CA 90071-1560